

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 30

**MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR, PETITIONER,**

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 29, 1943.

CERTIORARI GRANTED MAY 3, 1943.

**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

OCTOBER TERM, 1941.

No. 3787.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER FOR REVIEW,

MERCHANTS NATIONAL BANK OF BOSTON,
Executor.

PETITION FOR REVIEW OF DECISION OF UNITED STATES
BOARD OF TAX APPEALS.
DECISION, DECEMBER 17, 1941.

RECORD ON PETITION FOR REVIEW.

SAMUEL O. CLARK, JR.,

ASSISTANT ATTORNEY GENERAL,
SEWALL KEY,

SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,

for Petitioner.

EDWARD C. THAYER,

for MERCHANTS NATIONAL BANK, Executor.

BOSTON:

PRINTED UNDER DIRECTION OF THE CLERK.

1942

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3787.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

v.

MERCHANTS NATIONAL BANK OF BOSTON, EXECUTOR,
RESPONDENT.

RECORD ON PETITION FOR REVIEW.

[FILED IN CIRCUIT COURT OF APPEALS JUNE 8, 1942.]

DOCKET NO. 105004.

ESTATE OF OZRO MILLER FIELD, THE MERCHANTS NATIONAL
BANK OF BOSTON, Executor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES.

*For Taxpayer:

Edward C. Thayer, Esq.

For Commissioner:

J. T. Haslam, Esq.

DOCKET ENTRIES.

1940

Sept. 30 - Petition received and filed. Taxpayer notified. (Fee paid).

Sept. 30 - Copy of petition served on General Counsel.

Sept. 30 - Request for circuit hearing in Boston, Mass., filed by taxpayer. 9/30/40 copy served.

Record on Petition for Review:

1940

- Nov. 4 - Answer filed by General Counsel.
Nov. 4 - Request for hearing in Boston, Mass., filed by General Counsel.
Nov. 7 - Copy of answer and request served on taxpayer. Boston, Mass., Calendar.
Dec. 30 - Hearing set Feb. 24, 1941 in Boston, Mass.

1941

- Feb. 26 - Hearing had before Mr. Murdock on the merits. Submitted. Consolidated for hearing with 105005. Briefs due as per rules.
Mar. 14 - Transcript of hearing 2/26/41 filed.
Apr. 4 - Motion for extension to May 1, 1941 to file brief filed by General Counsel.
Apr. 11 - Brief filed by taxpayer.
Apr. 15 - Motion for extension to April 28, 1941 to file brief filed by General Counsel.
Apr. 17 - Brief lodged by General Counsel.
Apr. 17 - Motion of April 4, 1941, granted.
Apr. 18 - Copy of brief served on General Counsel.
May 2 - Reply brief filed by taxpayer.
Oct. 7 - Findings of fact and opinion rendered, Murdock, Div. 3. Decision will be entered under Rule 50.
Dec. 13 - Agreed computation of deficiency filed.
Dec. 17 - Decision entered, J. E. Murdock, Div. 3.

1942

- Mar. 10 - Petition for review by United States Circuit Court of Appeals, First Circuit, filed by General Counsel.
Mar. 13 - Proof of service filed.
Mar. 21 - Proof of service filed by General Counsel.
Apr. 11 - Joint motion for extension to 6/8/42 to prepare and transmit the record filed.
Apr. 11 - Order enlarging time to June 8, 1942, to prepare and transmit the record filed.
May 21 - Statement of points to be relied on filed by General Counsel, with statement of service by mail thereon.

Docket Entries.

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May 21 - Designation for record on review filed by General Counsel with statement of service by mail thereon.

May 29 - Designation of additional portions of the record filed by taxpayer. * Service by mail thereon.

June 1 - Proof of service of filing designation of additional portions of record filed by taxpayer.

June 2 - Agreed motion for correction of the record filed. 6/2/42. granted.

DOCKET NO. 105005.

ESTATE OF OZRO MILLER FIELD, THE MERCHANTS NATIONAL
BANK OF BOSTON, Executor, Petitioner,

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES.

For taxpayer:

Edward C. Thayer, Esq.

For Commissioner:

J. T. Haslam, Esq.

DOCKET ENTRIES.

1940

Sept. 30 - Petition received and filed. Taxpayer notified. (Fee paid).

Sept. 30 - Copy of petition served on General Counsel.

Sept. 30 - Request for circuit hearing in Boston, Mass., filed by taxpayer. 9/30/40 copy served.

Nov. 4 - Answer filed by General Counsel.

Nov. 4 - Request for hearing in Boston, Mass., filed by General Counsel.

Nov. 7 - Copy of answer and request served on taxpayer, Boston, Mass., Calendar.

Dec. 30 - Hearing set Feb. 24, 1941 in Boston, Mass.

1941

Feb. 26 - Hearing had before Mr. Murdock on the merits. Submitted. Consolidated for hearing with 105004. Briefs due as per rules.

Apr. 4 - Motion for extension to May 1, 1941 to file brief filed by General Counsel.

Apr. 11 - Brief filed by taxpayer.

Apr. 15 - Motion for extension to April 28, 1941 to file brief filed by General Counsel.

Apr. 17 - Brief lodged by General Counsel.

Apr. 17 - Motion of April 4, 1941 granted.

Docket Entries.

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1941

- Apr. 18 - Copy of brief served on General Counsel.
- May 2 - Reply brief filed by taxpayer.
- Oct. 7 - Findings of fact and opinion rendered, Murdock. Decision will be entered under Rule 50.
- Nov. 25 - Stipulation *re* fee filed.
- Dec. 13 - Agreed computation of deficiency filed.
- Dec. 17 - Decision entered, J. E. Murdock, Div. 3.

1942

- Mar. 10 - Petition for review by United States Circuit Court of Appeals, First Circuit, filed by General Counsel.
- Mar. 13 - Proof of service filed.
- Mar. 21 - Proof of service filed by General Counsel.
- Apr. 11 - Joint motion for extension to 6/8/42 to prepare and transmit the record filed.
- Apr. 11 - Order enlarging time to June 8, 1942 to prepare and transmit the record, entered.
- May 21 - Statement of points to be relied on filed by General Counsel, with statement of service by mail thereon.
- May 21 - Designation for record on review filed by General Counsel, with statement of service by mail thereon.
- May 29 - Designation of additional portions of the record filed by taxpayer. Service by mail thereon.
- June 1 - Proof of service of filing designation of additional portions of record filed by taxpayer.
- June 2 - Agreed motion for correction of the record filed. 6/2/42 granted.

Receivable: Petition for Review

Receipt No. 103498

[Title omitted.]

POSITION

[Filed September 10, 1940.]

The above-named petitioner hereby petitions for a determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, symbol T-44-15801, dated August 21, 1940, and in allness of its proceeding alleges as follows:

I. The petitioner is a corporate filer, with principal office at 28 State Street, Boston, Massachusetts. The return for the period here involved was filed with the Collector of Internal Revenue at Boston in the District of Massachusetts.

II. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on August 21, 1940.

III. The tax in controversy is income tax for the taxable year ending December 31, 1937, upon the estate of the decedent, Otis Miller Field, who died May 2, 1936, a citizen of the United States, residing at Beverly, Massachusetts, and in the amount of approximately \$82,821.69.

IV. The determination of tax set forth in the said notice of deficiency is based upon the following error:

Disallowance as a deduction from gross income of \$100,000.00, representing capital gains, which the petitioner asserts was permanently set aside for charitable purposes and is deductible under section 162 of the Revenue Act of 1936.

V. The facts upon which the petitioner relies as a basis of its proceeding are as follows:

A. Article Third of the will of the decedent provides:

Third: If my said wife, May L. Field, shall be living at the time of my decease, then and in that case I give, devise and bequeath all of the rest, residue and remainder of my

estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts, its Trust Executives, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarterly, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, ~~any~~ sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars (\$100,000) and hold the same in Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income,

to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:— one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts, during the term of his natural life, and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconess Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me, I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust."

B. Said Beverly Hospital Corporation and said New England Deaconess Hospital are both corporations organized and operated

exclusively for charitable purposes and no part of their earnings inures to the benefit of private stockholders or individuals, and no substantial part of their activities is carrying on propaganda or otherwise attempting to influence legislation.

C. In the taxable year ending December 31, 1937, the petitioner sold 2,000 shares of the preferred stock and 7,910 shares of the common stock of the Kennedy Company, a Massachusetts corporation, and 16 shares of stock of Radio Corporation of America, which were a part of the corpus of the trust under the decedent's will, realizing a net capital gain, as determined by the Commissioner pursuant to adjustments which are not complained of, in the amount of \$130,900.31.

D. At the date of the decedent's death, his wife, Mrs. May L. Field, was sixty-seven years old. The petitioner, which is also the duly appointed trustee under said Article Third, has not paid Mrs. Field anything from the principal of the trust fund.

E. Mr. Field had retired from business, and prior to his death he and Mrs. Field had been living in a comfortable manner, within the income of their property, at the rate of \$7,000 to \$8,000 a year. They had a furnished apartment in Beverly, and a summer home belonging to Mrs. Field in Buckland, Massachusetts. They had no children, but Mr. Field had adopted three children, who were not adopted children of Mrs. Field. These children were all of age and two of them were married and in no way dependent on Mr. and Mrs. Field for support. They contributed \$15 a week to the support of the third, Robert Field, who had just come of age, and he has since become self-supporting. They made presents from time to time to the children.

F. Since Mr. Field's death Mrs. Field has continued to live in the summer at her place in Buckland, employing, as formerly, a housekeeper and a chore boy. In the wintertime she has resided at the Hawthorne Inn in Salem, and latterly at the Hotel Vendome in Boston, both first-class residential hotels. Her standard of living and her mode of life is the same which she enjoyed in the lifetime of the decedent. Her total expenditures, including taxes

and contributions to charity and relatives, have been at the rate of approximately \$8,000 a year, or, from the date of death to the date of filing this petition, a period of four years and about five months, approximately \$36,000.

G. From the date of the decedent's death to the date of filing this petition Mrs. Field's income from all sources has been approximately \$91,600. Her income from her husband's estate and the trust under his will has been approximately \$12,000 a year. The fiduciary funds are conservatively invested and include approximately \$41,000 held in cash. Upon termination of the existing tax controversies this fund can be invested and the income from the trust increased. Her income from her separate property has been approximately \$5,500 a year. To provide for annual expenditures of the order of \$8,000, she has been in receipt of an income of the order of \$18,000 a year.

H. Mrs. Field's personal estate has increased from approximately \$85,000 at the time of her husband's death to approximately \$150,000 at the time of filing this petition, notwithstanding that she paid \$2,500 of Massachusetts inheritance tax on jointly owned property. She has increased her checking account by over \$22,000 and her savings bank accounts by over \$20,000, and she has continued to hold securities (principally stock of American Telephone & Telegraph Company, United Fruit Company and General Motors Corporation) which are now worth approximately \$91,000.

The capital value of the property held for her benefit by the petitioner under her husband's will has also increased from approximately \$260,000 at the time of the decedent's death, after providing for estate and inheritance taxes, to approximately \$320,000.

I. Mrs. Field was told by Mr. Field that he had accumulated his fortune from the public and that it should go back to the public through charity. She entertains the same conviction and has executed her will, leaving the residue of her personal estate to charity also. She is able to live in complete comfort and hap-

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ess on very much less than the income available to her and
 es not intend to suffer the charitable remainders left by her
 band's will to be impaired by any expenditures for her benefit.
 The petitioner does not propose to make any expenditures
 m the principal of the trust, for the benefit of Mrs. Field ex-
 t such expenditures, if any, as may be requisite to protect Mrs.
 ld from adversity and to enable her to be maintained in the
 ne comfortable station in life and continue the same manner
 living she enjoyed as the wife of the decedent.

K. The possibility that any of the principal of the residuary
 st will ever be paid to Mrs. Field is so remote as to be merely
 demic; and the capital gains in question should be held to
 e been permanently set aside in the taxable year for charitable
 poses as contemplated by section 162(a) of the Revenue Act
 1934, and are, consequently, allowable deductions from the
 itioner's gross income.

Wherefore the petitioner prays that this Board may hear the
 ceeding and redetermine the deficiency.

EDWARD C. THAYER,

Counsel for the Petitioner,

53 State Street, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS,

COUNTY OF SUFFOLK, ss.

Albert H. Waite, being duly sworn, says that he is an assistant
 st officer of The Merchants National Bank of Boston, the peti-
 ner above named, and as such is duly authorized to verify the
 egoing petition; that he has read the foregoing petition, or had
 same read to him, and is familiar with the statements con-
 ned therein, and that the statements contained therein are
 e, except those stated to be upon information and belief, and
 t those he believes to be true.

ALBERT H. WAITE.

ubscribed and sworn to before me this twenty-eighth day of
 eptember, 1940.

MIRIAM BUTLER,

NOTARIAL SEAL]

Notary Public.

My commission expires November 5, 1943.

EXHIBIT A.

Form 1230

Copy

SN-IT-1

Treasury Department Internal Revenue Service

Office of Internal Revenue Agent in Charge Boston Division
140 Federal Street

Aug. 2, 1940

Estate of Ozro M. Field, The Merchants National Bank of Boston,
Executor, 28 State Street, Boston, Massachusetts,

Registered Mail

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses a deficiency of \$42,825.69 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Boston, Mass. for the attention of TMK:90-D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, Commissioner,

By (Sgd.) T. M. Kenefick,
Internal Revenue Agent in Charge

Enclosures: Statement. Form of waiver.

TMK:HWL:ASH:c

Boston Division

STATEMENT

Estate of Ozzie M. Field, The Merchants National Bank of Boston,
 Executor, 28 State Street, Boston, Massachusetts.

Tax Liability for Taxable Year Ended December 31, 1937.

	Liability	Assessed	Deficiency
Income tax	\$44,184.01	\$1,358.32	\$42,825.69

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated June 9, 1939; to your protest submitted in January, 1940 and to the statements made at the conference held on January 16, 1940.

A copy of this letter and statement has been mailed to your representative, Edward C. Thayer, Esquire, 53 State Street, Boston, Massachusetts, in accordance with the authority contained in the power of attorney executed by you and on file with this office.

Net income of \$16,525.52 as returned for the year 1937 is increased by the sum of \$100,900.31 to reflect the capital gains realized on the sales of corpus assets.

Careful consideration has been given to your contention that the said amount is deductible under Section 162, Revenue Act of 1936, on the theory that the amount in question was permanently set aside for the Beverly Hospital Corporation and/or The Palmer Memorial Unit of New England Deaconess Hospital during the year 1937. That contention cannot be sustained because the decedent in his last will and testament, Clause 3, gave the trustee power to invade corpus of the trust for the benefit of the Decedent's wife, which makes it impossible to determine the amount, if any, which the charitable legatees will eventually receive.

Adjustments to Net Income

Net income as disclosed by return	\$16,525.52
Unallowable deductions and additional income:	
(a) Taxable capital gain	\$100,900.31
Net income adjusted	\$117,425.83

Record on Petition for Review.

Explanation of Adjustments

(a) Taxable capital gain \$100,900.31

On line 7 of your return for the year 1937 (Form 1041) you reported capital gain in the amount of \$130,900.31 but in computing your taxable net income on line 17 of said return you deducted said gain of \$130,900.31 on the ground that it was permanently set aside for purposes contemplated by section 162 of the Revenue Act of 1936. You are now advised that capital gain realized by you during 1937 in an adjusted amount of \$100,900.31 is deemed to be taxable to you for reasons stated in the foregoing paragraphs contained herein.

Capital gain included on line 7 of return	\$130,900.31
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As corrected herein	100,900.31
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Adjustment	<u>\$30,000.00</u>
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Gain on sale of 2,000 shares of Kennedy Company 7% Preferred Stock has been reduced from \$95,860.00, as reported in your return, to \$65,860.00 in accordance with the recommendation of the Technical Staff.

Computation of Tax

Net income adjusted	\$117,425.83
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Less: Personal exemption	1,000.00
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Balance (subject to normal tax and surtax)	<u>\$116,425.83</u>
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Normal tax at 4 percent	\$4,657.03
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Surtax	39,526.98
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Correct income tax liability	<u>\$44,184.01</u>
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Tax previously assessed, account No. 186765 (Mass.)	1,358.32
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Deficiency of income tax	<u>\$42,825.69</u>
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Docket No. 105004.

[Title omitted.]

ANSWER.

[Filed November 4, 1940.]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition excepting the allegation as to the amount of tax in controversy, which allegation is denied.

IV. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph IV of the petition.

V. A to K, inc. Denies the allegations of fact and other matter contained in subparagraphs A to K, inclusive, of paragraph V of the petition.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

J. P. WENCHEL, JTH,

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

CHARLES P. REILLY,

Division Counsel.

J. T. HASLAM, *Special Attorney,*

Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 105005.

Estate of Ozro Miller Field, The Merchants National Bank of
Boston, Executor, Petitioner

v.

Commissioner of Internal Revenue, Respondent.

* PETITION.

[Filed September 30, 1940.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, symbols TMK:JJH:mgo, dated July 3, 1940; and as a basis of its proceedings alleges as follows:

I. The petitioner is a corporate fiduciary, with principal offices at 28 State Street, Boston, Massachusetts. The return for the period here involved was filed with the Collector of Internal Revenue at Boston in the District of Massachusetts.

II. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 3, 1940.

III. The tax in controversy is estate tax upon the Estate of Ozro Miller Field, a decedent, who died May 3, 1936, a citizen of the United States, residing at Beverly, Massachusetts, and in the amount of approximately \$26,290.93.

IV. The determination of tax set forth in the said notice of deficiency is based upon the following error:

Disallowance as a deduction from the gross estate of \$128,276 claimed on Schedule N of the return as the value of remainder interests given to charity, and failure to increase such deduction in accordance with other adjustments made in said deficiency letter which are not complained of.

V. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

A. Article Third of the will of the decedent provides:

"Third. If my said wife, May L. Field, shall be living at the time of my decease, then and in that case I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts, In Trust, Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars (\$100,000) and hold the same In

Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:—one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts during the term of his natural life; and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall de cease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconness Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconness Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me, I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said

"The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust."

B. Said Beverly Hospital Corporation and said New England Deaconess Hospital are both corporations organized and operated exclusively for charitable purposes and no part of their earnings inures to the benefit of private stockholders or individuals, and no substantial part of their activities is carrying on propaganda or otherwise attempting to influence legislation.

C. At the date of the decedent's death, his wife, Mrs. May L. Field, was sixty-seven years old. The petitioner, which is also the duly appointed trustee under said Article Third, has not paid Mrs. Field anything from the principal of the trust fund.

D. Mr. Field had retired from business and, prior to his death, he and Mrs. Field had been living in a comfortable manner, within the income of their property, at the rate of \$7,000 to \$8,000 a year. They had a furnished apartment in Beverly and a summer home belonging to Mrs. Field in Buckland, Massachusetts. They had no children, but Mr. Field had adopted three children, who were not adopted children of Mrs. Field. These children were all of age and two of them were married and in no way dependent on Mr. and Mrs. Field for support. They contributed \$15 a week to the support of the third, Robert Field, who had just come of age, and he has since become self-supporting. They made presents from time to time to the children.

E. Since Mr. Field's death Mrs. Field has continued to live in the summer at her place in Buckland, employing, as formerly, a housekeeper and a chore boy. In the wintertime she has resided at the Hawthorne Inn in Salem, and latterly at the Hotel Vendome in Boston, both first-class residential hotels. Her standard of living and her mode of life is the same which she enjoyed in the lifetime of the decedent. Her total expenditures, including taxes and contributions to charity and relatives, have been at the rate of approximately \$8,000 a year, or, from the date of death to the date of filing this petition, a period of four years and about five months, approximately \$36,000.

F. From the date of the decedent's death to the date of filing this petition Mrs. Field's income from all sources has been approximately \$541,000. Her income from her husband's estate and the trust under his will has been approximately \$312,000 a year. The fiduciary funds are conservatively invested and include approximately \$341,000 held in cash. Upon termination of the existing tax controversies the fund can be aggested and the income from the trust increased. Her income from her separate property has been approximately \$75,000 a year. To provide for annual expenditures of the order of \$60,000 a year, she has been in receipt of an income of the order of \$750,000 a year.

G. Mrs. Field's personal estate has increased from approximately \$65,000 at the time of her husband's death to approximately \$250,000 at the time of filing this petition, notwithstanding that she paid \$22,500 of Massachusetts inheritance tax on jointly owned property. She has increased her checking account by over \$22,000 and her savings bank accounts by over \$20,000, and she has continued to hold securities (principally stock of American Telephone & Telegraph Company, United Fruit Company and General Motors Corporation) which are now worth approximately \$91,000.

The capital value of the property held for her benefit by the petitioner under her husband's will has also increased from approximately \$260,000 at the time of the decedent's death, after providing for estate and inheritance taxes, to approximately \$520,000.

H. Mrs. Field was told by Mr. Field that he had accumulated his fortune from the public and that it should go back to the public through charity. She entertains the same conviction and has executed her will, leaving the residue of her personal estate to charity also. She is able to live in complete comfort and happiness on very much less than the income available to her and does not intend to suffer the charitable remainders left by her husband's will to be impaired by any expenditures for her benefit.

I. The petitioner does not propose to make any expenditures from the principal of the trust for the benefit of Mrs. Field

except such expenditures, if any, as may be requisite to protect Mrs. Field from adversity and to enable her to be maintained in the same comfortable station in life and continue the same manner of living she enjoyed as the wife of the decedent.

J. The possibility that any of the principal of the residuary trust will ever be paid to Mrs. Field is so remote as to be merely academic, and such principal should be held to have been bequeathed under the terms of her husband's will for charitable purposes.

Wherefore the petitioner prays that this Board may hear the proceeding and redetermine the deficiency.

EDWARD C. THAYER,

Counsel for the Petitioner,

55 State Street, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS,

COUNTY OF SUFFOLK, ss.

Albert H. Waite, being duly sworn, says that he is an assistant trust officer of The Merchants National Bank of Boston, the petitioner above named, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ALBERT H. WAITE,

Subscribed and sworn to before me this twenty-eighth day of September, 1910.

MIRIAM BUTLER,

[NOTARIAL SEAL]

Notary Public.

My commission expires November 5, 1913.

EXHIBIT A.

Form 1236

Copy

SN-ET-1

Treasury Department Internal Revenue Service
Office of Internal Revenue Agent in Charge Boston Division
Est. of Ozro Miller Field

Jul. 3, 1940

Registered Mail

The Merchants National Bank of Boston, Executor, 28 State Street,
Boston, Massachusetts,

Gentlemen:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of \$26,290.93, as shown in the statements attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Boston, Mass. for the attention of Estate Tax Division. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, Commissioner,

By (Sgd). T. M. Kenefick

Internal Revenue Agent in Charge.

TMK:JJH:mgo

Enclosures: Statement. Form or waiver.

MT-ET:13069-Massachusetts

Est. of Ozto Miller Field Date of Death: May 3, 1936

STATEMENT

The deficiency results from the following adjustments:

Gross Estate

Schedule B, Stocks and Bonds

	Returned	Determined
Item 1	\$52,981.25	\$52,718.75 (a)
Item 3	3,575.00	3,625.00 (b)
Item 6	150,000.00	180,000.00 (c)

Schedule E, Jointly Owned Property

Item 1	52,981.25	52,718.75 (d)
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Deductions

Charitable, public, and similar gifts

and bequests	128,276.94	None (e)
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(a) and (d) The value of 350 shares of stock of American Telephone and Telegraph company is determined to be \$52,718.75 (*i.e.* \$150-5/8 per share) rather than \$52,981.25 (*i.e.* \$151-3/8 per share) as returned. The resulting reduction in gross estate amounts to \$262.50 in each Schedule B, Item 1, and Schedule E, Item 1.

(b) The value of 100 shares of General Electric Company common stock is determined to be \$3,625.00 (*i.e.* \$36-1/4 per share) rather than \$3,575.00 (*i.e.* \$35-3/4 per share) as returned. The resulting increase in gross estate is \$50.00.

(c) The value of 2,000 shares of 7% preferred stock of The Kennedy Company, Boston, Massachusetts, is determined to be \$180,000.00 (*i.e.* \$90.00 per share) rather than \$150,000.00 (*i.e.* \$75.00 per share) as returned.

(e) Deduction claimed for charitable, public, and similar gifts and bequests is disallowed because the decedent in his last will and testament, Clause 3, gave the trustee power to invade the

corpus of the trust, which makes it impossible to determine the amount, if any, which the charitable legatees will eventually receive.

In view of the foregoing the Federal Estate Tax Liability of this estate is finally determined as follows:

	Determined
Gross Estate	366,527.66
Deduction (1926 Act)	117,967.86
Net Estate (1926 Act)	248,559.80
Net Estate	308,559.80
Gross Tax (1926 Act)	6,442.39
Credit for state, estate, inheritance, legacy or succession taxes	<u>4,844.32</u>
Net Tax (1926 Act)	1,598.07
Total Gross Taxes (1926 & 1932 Acts)	48,311.96
Gross Tax (1926 Act)	6,442.39
Net Additional Tax	41,869.57
Net Tax (1926 Act)	<u>1,598.07</u>
Total Net Tax	43,467.64
Amount shown on Return	<u>17,176.71</u>
Deficiency	26,290.93

The deficiency bears interest at the rate of six per cent per annum from fifteen months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals, \$25,981.34 of the deficiency will be assessed. Credit is allowed for state, estate, inheritance, legacy or succession taxes in the sum of \$4,844.32 actually paid and supported by proof required by Regulations '80, Article 9 (b).

As the balance of the deficiency may be eliminated by credit for State or Territorial Estate, inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations 80. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

Docket No. 105005.

[Title omitted.]

ANSWER.

[Filed November 4, 1940.]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue; and in answer to the petition filed herein, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition excepting as to the amount of tax in controversy which allegation is denied.

IV. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph IV of the petition.

V. Denies the allegations of fact and other matters contained in subparagraphs A to J, inclusive, of paragraph V of the petition.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

J. P. WENCHEL, JTH,

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

CHARLES P. REILLY,

Division Counsel.

J. T. HASLAM,

Special Attorney, Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS.

Estate of Ozro Miller Field, The Merchants National Bank of
Boston, Executor, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 105004, 105005. Promulgated October 7, 1941.

Deductions—Charitable Uses.—The corpus of a testamentary trust could be used if in the discretion of the trustee it was necessary for the "comfort, support, maintenance, and/or happiness" of the life tenant. The remainder went to charities. *Held*, the possibility of invading corpus was sufficiently remote to justify deduction of the charitable bequest for estate tax purposes and for allowing an income tax deduction under section 162 for capital gains accumulated.

EDWARD C. THAYER, Esq., for the petitioner.

JOHN T. HASLAM, Esq., for the respondent.

The Commissioner determined a deficiency of \$42,825.69 in income tax for 1937 (Docket No. 105004) and a deficiency of \$26,290.93 in estate tax (Docket No. 105005). The issue for decision in the estate tax case is whether the estate is entitled to a deduction for a bequest to charity of a remainder interest. The issue in the income tax case is whether the estate is entitled to a deduction under section 162 of the Revenue Act of 1937 of capital gains allegedly permanently set aside for charitable purposes.

FINDINGS OF FACT.

Ozro M. Field died testate in Massachusetts on May 3, 1936. The returns in question were filed with the collector in Massachusetts. The petitioner is the duly authorized executor of the estate.

The decedent was survived by his widow, May L. Field, who was then sixty-seven years of age. They had no children. The decedent never had any children of his own, but he had adopted three children, Deborah, Elizabeth, and Robert, before the death of his first wife. They were never adopted by May. They survived the decedent. The two girls were each twenty-seven and married, and Robert nearly twenty-one in 1936. The husbands of the girls were fully able to support them.

The gross estate of the decedent, as determined by the Commissioner, amounted to \$366,527.66, and included \$52,718.75 of property held jointly by the decedent and his wife. The widow owned income-producing property worth about \$104,000 immediately after the death of her husband. She also owned tangible personal property and a comfortable country home in Buckland, Massachusetts. Most of her property had been given to her by her husband.

The decedent provided in his will that his property should be held in trust; the net income was to be paid to his wife for life, with the right in the corporate trustee to pay from the principal any amount which it should "in its sole discretion deem wise and proper for the comfort, support, maintenance and/or happiness of my said wife, and it is my wish and will that . . . my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust"; \$100,000 was to be held in trust after the death of the wife and the income from one-fourth paid to each of the three adopted children for life and to Dora L. Russell, a niece of May L. Field, for life; the remainder was to go to named charities upon the death of May; and, as

each life beneficiary of the \$100,000 trust died, one-fourth of the principal was to go to named charities.

The Commissioner concedes that the charitable beneficiaries are corporations of such character as to render legacies to them deductible under both the estate and income tax laws. The parties are in agreement as to the value of the life estates.

The decedent and May had agreed that, since his wealth had come from the public patronage of Kennedy retail clothing stores, it would be appropriate to leave it to charities. They wrote wills simultaneously leaving the remainder interests in their estates to charities in which they were interested, hospitals.

The annual living expenses of the decedent and his wife just prior to his death had amounted to about \$6,000. They lived simply but comfortably. They paid all of the expenses of Robert, who lived with a niece of May, and gave presents to Elizabeth and Deborah as suited their pleasure.

The annual living expenses of May after the death of her husband amounted to between \$6,000 and \$7,000. She never needed or received any of the principal of the trust and has no intention of ever asking for any.

Her total income from her own property and the trust, and the amount she has actually spent has been as follows:

Period	Income	Expenditures
1936 (7 months)	\$10,735.35	\$1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.66	13,389.31
Total	87,362.66	48,682.04

The estate is holding uninvested about \$41,000. The expenditures included Massachusetts inheritance tax of \$2,518.46 paid in 1937, \$855 for an automobile and later \$1,435 for another, \$2,250 for a mink coat, \$1,600 for two trips, \$700 in 1940 to help the niece when her husband died, \$1,500 to help the niece's son complete

medical school, and an undisclosed amount for a fur coat for Deborah. May has given all of the help that she desired to give, including gifts to persons in any way related to herself or to the decedent, and has saved excess income of about \$40,000 from 1936 through 1940, which she intends to hold for any special purpose which may arise.

The value of the trust estate at the close of 1940 was about \$366,000 and that of the personal property of May was about \$151,000.

The estate realized capital gains of \$100,900.31 in 1937, \$65,860 of which was from the sale of 2,000 shares of 7 per cent preferred stock of the Kennedy Co. May sold 176 shares of the same stock in 1937.

The Commissioner disallowed all of the deduction claimed on the estate tax return for charitable bequests and all of the deductions claimed on the income tax return under section 162. He explained that the right to invade the corpus for the benefit of the widow made it impossible to determine the amount of any bequest to charity.

OPINION.

MURDOCK: The estate tax law allows a deduction for the amount of all bequests or legacies to corporations organized for charitable purposes and the income tax law allows a similar deduction for any part of the gross income which is permanently set aside for such purposes. The remainder interest in the decedent's estate, including the amount realized from the sale of securities (the capital gains), was to go to charitable corporations, hospitals. The Commissioner contends, however, that no deduction is proper because the corpus could be invaded and it is impossible to determine how much might be used up by the widow. He does not suggest that the entire corpus might be used by her, yet he has allowed no deduction. He does not question the fact that the capital gains became a part of the corpus of the trust.

The corpus could be invaded only in case the trustee concluded, in the exercise of its discretion, that income was insufficient for

the "comfort, support, maintenance, and/or happiness" of the widow and the use of principal would be "wise and proper". Cases where the beneficiary was not restricted in any way and cases where annuities for after-born children might consume the corpus are not in point. Cf. *Mercantile Trust Co., Executor*, 13 B.T.A. 85; aff'd., 43 Fed. (2d) 39. The problem is similar to that involved in *Ithaca Trust Co. v. United States*, 279 U.S. 151. The income and such part of the principal as might be "necessary to suitably maintain" her "in as much comfort as she now enjoys" was to go to the life tenant and the remainder was to go to charity. The court said:

The case presents two questions, the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under section 403(a)(3), *supra*, in order to ascertain the estate tax cannot be allowed. . . . This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The same principles apply in an income tax case. *Helen G. Bonfils et al., Executors*, 40 B.T.A. 1079; *F. G. Bonfils, Trust*, 40 B.T.A. 1085; aff'd., 115 Fed. (2d) 788. The standard fixed by Field was also capable of being stated in fairly definite terms of money. The income of the estate at the death of the testator was more than sufficient to maintain the widow as required and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs. There is evi-

dence of the amount of income which could be expected and of the probable expenditures of the widow. The former was about 1.8 times the latter. The actual living expenses of the widow were about one-third of the average income. There is evidence that the widow would be most reluctant to invade the corpus of the trust. The contention of the respondent that there was a "trend" of declining income and ascending expenditures is not borne out by the evidence. The income has been uniform in amount since the sale of the Kennedy 7 per cent preferred stock. The expenditures of the widow have increased somewhat as she found some new uses for a part of her excess income, but there is reason to believe that she will never want more than income from the trust. This may be a borderline case,¹ but the possibility of corpus being invaded is sufficiently remote to justify the deductions claimed.

Reviewed by the Board.

Decision will be entered under Rule 50.

BLACK, TURNER, KERN, and OPPER dissent.

¹ Income was about five times the amount needed for the annuities in the *Bonfils* case. The deduction was disallowed in *Boston Safe Deposit & Trust Co. v. Commissioner*, 26 B.T.A. 486; *affd.*, 66 Fed. (2d) 179; *certiorari denied*, 290 U.S. 700, where income was only about 1.4 times the amount needed for annuities and there was a possibility that more annuitants would be born.

UNITED STATES BOARD OF TAX APPEALS.

Docket Nos. 105004, 105005.

Estate of Ozro Miller Field, The Merchants National Bank of
Boston, Executor, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

DECISION.

Entered December 17, 1941.

The respondent, on December 13, 1941, filed a proposed computation pursuant to the Board's findings of fact and opinion pro-

mulgated October 7, 1911. The petitioner agrees with said computation and has noted his acquiescence thereon. Therefore, it is

Ordered and decided, that there is no deficiency in income tax for the year 1937 and that there is a deficiency in estate tax in the amount of ~~\$1,461.04~~.

Enter: J. E. MURDOCK, *Member*.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

PETITION FOR REVIEW.

[Filed March 10, 1942.]

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the First Circuit to review the decision entered by the United States Board of Tax Appeals on December 17, 1941, that there is no deficiency in income tax for the year 1937 and that there is a deficiency in estate tax due from the Estate of Ozro Miller Field, deceased (date of death, May 3, 1936), only in the amount of \$1,461.04. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The Merchants National Bank of Boston, with its principal place of business at 28 State Street, Boston, Massachusetts, is the executor of the will of Ozro Miller Field, the decedent herein. The income and estate tax returns made on behalf of the decedent's estate by the aforesaid executor, were filed with the Collector of Internal Revenue for the District of Massachusetts, whose office is located at Boston, Massachusetts, which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

NATURE OF THE CONTROVERSY.

The nature of the controversy is as follows, to-wit:

The decedent, under the provisions of his will, placed his residuary estate in trust. The income from the trust corpus was directed

to be paid to the decedent's widow for life, with remainder to charitable organizations. The trustee of the trust estate was authorized to pay to the decedent's widow such sums from the principal of the trust fund as it should deem wise and proper for the comfort, support, maintenance and/or happiness of the widow, such authority to be liberally exercised, prior to the claims of residuary beneficiaries.

The trustee of the trust estate, in 1937, realized capital gains upon the sale of assets of the trust. In the income tax return of the estate for that year, the executor claimed a deduction from gross income of the amount of the capital gains as income permanently set aside for charity; and in the estate tax return filed on behalf of the decedent's estate, the executor claimed a deduction in the amount of the value of the remainder interest in the trust corpus as a bequest to charitable organizations.

In determining deficiencies in the income and estate tax liability of the estate, the Commissioner disallowed the claimed deductions because the right to invade the trust corpus made it impossible to determine the amount of the value of the trust corpus, if any, that would eventually pass to charity.

The two cases were consolidated for hearing before the Board of Tax Appeals and a single opinion was promulgated, and a single decision was entered. The findings of fact and opinion of the Board was promulgated October 7, 1941, in which the Board erroneously held and decided that the estate was entitled to the claimed deductions; and the final order of redetermination of the deficiencies was entered on December 17, 1941, in which the Board erroneously decided that there was no deficiency in the income tax for the year 1937, and that there was a deficiency in the estate tax only in the amount of \$1,461.04.

SAMUEL O. CLARK, JR.,

Assistant Attorney General.

J. P. WENCHEL, RLW,

Chief Counsel, Bureau of Internal Revenue,

Attorneys for Petitioner on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed March 13, 1942.]

To EDWARD C. THAYER, Esq., 53 State Street, Boston, Massachusetts.

You are hereby notified that the Commissioner of Internal Revenue did, on the tenth day of March, 1942, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled causes. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this tenth day of March, 1942.

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this twelfth day of March, 1942.

EDWARD C. THAYER,

Attorney for Respondent on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed March 21, 1942.]

To THE MERCHANTS NATIONAL BANK OF BOSTON, Exec., Estate of Ozro Miller Field, 28 State Street, Boston, Massachusetts.

You are hereby notified that the Commissioner of Internal Revenue did, on the tenth day of March, 1942, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals

for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this tenth day of March, 1942.

J. P. WENCHEL, RLW,

Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this fourteenth day of March, 1942.

THE MERCHANTS NATIONAL BANK OF BOSTON, Exec.,

Estate of OZRO MILLER FIELD,

by A. H. WAITE, Asst. Trust Officer,

Respondent on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

STATEMENT OF POINTS TO BE RELIED ON BY
PETITIONER ON REVIEW.

[Filed May 21, 1942.]

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

1. The Board of Tax Appeals erred in holding and deciding that the estate is entitled to a deduction from gross income of the amount of capital gains upon sale of assets of the residuary trust estate as permanently set aside for charitable purposes.
2. The Board of Tax Appeals erred in not holding and deciding that the estate is not entitled to a deduction from gross income of capital gains realized upon sale of assets of the trust estate set up under the decedent's will.

3. The Board of Tax Appeals erred in holding and deciding that the estate is entitled to a deduction from the decedent's gross estate of the amount of the value of the remainder interest in the residuary trust estate created under the decedent's will, as a bequest to charitable organizations.

4. The Board of Tax Appeals erred in not holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate of the amount of the value of the remainder interest in the residuary trust estate created under the decedent's will, as a bequest to charitable organizations.

5. The Board of Tax Appeals erred in entering its order of redetermination that there is no deficiency in income tax for the year 1937, and that there is a deficiency in estate tax in the amount of \$1,461.04.

6. The Board of Tax Appeals erred in failing and refusing to enter its order of redetermination that there are deficiencies in income tax and estate tax due from the decedent's estate in the respective amounts asserted by the Commissioner.

SAMUEL O. CLARK, JR.,

Assistant Attorney General,

J. P. WENCHEL, RLW,

Chief Counsel, Bureau of Internal Revenue.

Copy of this statement of points was mailed to Edward C. Thayer, Esq., 53 State Street, Boston, Massachusetts, attorney for respondent on review, this day, May twentieth, 1942.

RALPH F. STAUBLY,

Special Attorney, Bureau of Internal Revenue.

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE
UNITED STATES BOARD OF TAX APPEALS.

[Filed March 14, 1941.]

Docket Nos. 105004-5.

Estate of Ozro Miller Field, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Hearing at Boston, Mass., February 26, 1941.

[Titles omitted.]

Court Room No. 5, Federal Building,
Boston, Massachusetts, February 26, 1941.

[Met pursuant to notice at 10:00 A.M.]

Before: J. EDGAR MURDOCK, Member.

Appearances:

EDWARD C. THAYER, Esq., for the Estate of Ozro Miller Field,
the petitioner.

JOHN T. HASLAM, Esq., for the Commissioner of Internal
Revenue, respondent.

* * * * *

ALBERT H. WAITE, called as a witness in behalf of the peti-
tioner, having been first duly sworn, was examined and testified as
follows:

The Clerk. Give the reporter your name?

The Witness. Albert H. Waite.

Direct Examination.

Q. 1 (by Mr. Thayer). Your name is Albert H. Waite? A.
Yes.

Q. 2. What is your position with the Merchants National Bank
of Boston? A. Assistant trust officer.

Q. 3. And as such, what are your duties? A. The administra-
tion of estates and trusts come under my supervision.

Q. 4. With reference to the Field estate and the trust under the Field will, will you state whether or not that is directly under your supervision? A. It is.

Q. 5. And have you also had supervision of Mrs. Field's agency account at the bank? A. Yes.

Q. 6. And are you the person who consults with Mrs. Field when she comes to the bank in regard to her affairs? A. Yes.

Q. 7. And the records of the department come under your supervision? A. Yes.

Q. 8. Mr. Waite, at my request did you have one of your associates, Mr. Linden, prepare, from the records in the bank, and from letters concerning savings bank accounts, and a letter concerning the account in the Franklin County Trust Company of Greenfield—did you cause to be prepared certain computations which I outline, designed to show the income available to Mrs. Field in every year, and also to show the status of her capital and the capital in the estate and trust, and also to show the maximum expenditures not accounted for by investment, which have been made by her since the death of Mr. Field? A. I did.

Mr. Thayer. I would like to offer this in evidence.

Q. 9 (by Mr. Thayer). Are these the computations which you caused to be made? A. Yes.

Mr. Thayer. I would like to offer in evidence three schedules. I will call them, one entitled, "May L. Field Annual Income, May 3rd to December 31st, 1940", which I would like to have marked Exhibit A or 1, if your Honor please.

The Member. If there is no objection they are admitted.

Mr. Haslam. There is no objection to the admission.

[The schedule referred to was received in evidence and marked Petitioner's Exhibit 1.]

Mr. Thayer. Two, a schedule entitled, "Capital, May L. Field, and Estate and Trust also of May L. Field, May 3, 1936–December 31, 1940", which I would like to have marked Exhibit No. 2.

Mr. Haslam. No objection.

[The schedule referred to was received in evidence and marked Petitioner's Exhibit 2.]

Mr. Thayer. And thirdly, the schedule entitled "Expenditures of May L. Field, May 3, 1936 to December 31, 1940". Would your Honor like to have those submitted in duplicate or a copy of them given to you at this point?

The Member. No, duplicates are not necessary unless—

Mr. Thayer. I have plenty of them.

The Member. —unless you want to put them in so that if on appeal you wanted to save expense of having copies made, you would have them in the record.

Mr. Thayer. I have plenty of them, so I will give them to your Honor, so you can follow them.

[The schedule above referred to was received in evidence and marked Petitioner's Exhibit 3.]

Mr. Thayer. Mr. Haslam suggests that I make a statement of the purpose for which these are offered, your Honor. The primary purpose is to show what the record of the estate and trust and of Mrs. Field shows in income expenditures and increases in capital on a consolidated basis. I think there is no question of materiality of the situation at Mr. Field's death so far as the estate tax is concerned or showing the situation in the year 1937, which is concerned in the income tax case, but I also submit that they are admissible as respects the subsequent years to date, as confirmatory of the situation which might have been envisaged at that time as to be anticipated for those years.

Mr. Haslam. That is satisfactory.

Q. 10 (by Mr. Thayer). Mr. Waite, has Mrs. Field ever asked you or the bank to make her any advances or payments from the principal of the estate of the trust? A. No.

Q. 11. Did you have a conference with Mrs. Field before any tax returns had been filed, a conversation, I think in and about February of 1937 in regard to the adequacy of her resources? A. I recall having some conversation. The exact date has slipped my mind.

Mr. Thayer. Have you any objection to my showing Mr. Waite an affidavit which he made?

Mr. Haslam. No.

The Witness. I remember that.

Q. 12 (by Mr. Thayer). You remember such a conference? A. Yes.

Q. 13. Will you tell us the substance of that conference, Mr. Waite? A. As I recall it, I discussed with Mrs. Field the taxability of the charitable remainders or non-taxability. I made a memorandum at the time. I can't definitely say from memory.

Q. 14. Just a minute. I think I have that, too. [Hands paper to witness.] A. Yes, this is the memorandum.

Q. 15. Refresh your recollection from that and tell us what that conference was, Mr. Waite? A. That was about the time Mrs. Field received the proceeds of the sale of her Kennedy stock, and she was discussing with me what to do with the proceeds. It was pointed out that she could invest it in stocks and bonds or put it in a savings account, and in as much as she already had a large number of deposits in the savings account, stress was laid on stocks and bonds at this point. As I recall it, as a result of that conference, Mrs. Field opened a so-called investment management or agency account with our trust department, with the sum of \$19,000.

Q. 16. What, if anything, did she say to you then about the adequacy of her income for her purposes? A. When the lower yield of savings bank interest was mentioned, she said that—I may not be able to correctly quote her, but to the effect, at least, that she had adequate income for her needs and was not particularly interested in receiving more income from securities, if invested in securities, but nevertheless she decided to invest in those securities under our management.

Mr. Thayer. I don't think I have any more questions.

Mr. Haslam. No questions.

Mr. Thayer. I would like to offer a certified copy of the will.

The Member. No objection?

Mr. Haslam. No objection.

The Member. Admitted.

Mr. Thayer. That will be marked Exhibit 4.

[The document referred to was received in evidence and marked Petitioner's Exhibit 4.]

Mr. Thayer. I would like to offer certificates of the appointment of the Merchants National Bank as executor and trustee under the will.

Mr. Haslam. No objection.

The Member. Petitioner's Exhibit 5, and 6.

[The documents referred to were received in evidence and marked Petitioner's Exhibit 5, and 6.]

Mr. Thayer. I would like to offer certified copies of the decrees of the Probate Court of Essex County showing the adoption of three children by Mr. Ozro Field and his former wife, Grace Lewis Field.

Mr. Haslam. No objection.

The Member. Admitted.

[The documents referred to were received in evidence and marked Petitioner's Exhibits 7, 8 and 9.]

Mr. Thayer. Now, Mrs. Field, will you take the stand, please?

MAY L. FIELD, called as a witness in behalf of the petitioner, having been first duly sworn, was examined and testified, as follows:

Direct Examination.

Q. 1 (by Mr. Thayer). Will you give the reporter your name, please? A. May L. Field.

Q. 2. And you are the widow of the late Ozro Miller Field? A. Yes.

Q. 3. Where do you live, Mrs. Field? A. Buckland, Massachusetts.

Q. 4. What was your age at the time of Mr. Field's death in May, 1936? A. Sixty-seven.

Q. 5. When were you and Mr. Field married? A. September 9th, 1919.

Q. 6. Mr. Field had been married before? A. Yes.

Q. 7. Did you and Mr. Field have any children? A. No.

Q. 8. Did Mr. Field have any children by his first marriage?

A. No.

Q. 9. Did you, yourself, adopt the three children who had been adopted by Mr. Field and his first wife? A. No.

Q. 10. At the time of Mr. Field's death, will you tell me how old these children were, or how they were situated in life? A. Deborah was 27; Elizabeth, 27; and Robert not quite 21.

Q. 11. Were the girls married? A. Yes.

Q. 12. Were their husbands capable of supporting them? A. Yes.

Q. 13. Where was Robert living at the time? A. With my niece.

Q. 14. With your niece? A. In Peabody.

Q. 15. Where were you and Mr. Field living? A. In an apartment in Beverly and in the country.

Q. 16. And a country estate in Buckland? A. Yes.

Q. 17. Mr. Field had given you that estate? A. Yes.

Q. 18. Do you know how much it cost? A. Three thousand.

Q. 19. Is this a photo of it, Mrs. Field? A. Yes.

Mr. Thayer. I offer this in evidence.

The Member. It is admitted.

[The photograph referred to was received in evidence and marked Petitioner's Exhibit 10.]

Q. 20 (by Mr. Thayer). Can you estimate for us, Mrs. Field, about how much it cost you and Mr. Field to live a year when you were living in the apartment in Beverly before Mr. Field's death? A. I think our own expenses, about \$6,000; I think.

Q. 21. To what extent were you, at that time, at the time of Mr. Field's death, making provisions for his adopted children?

A. Well, Robert, we paid all his expenses and his board, and the other children, we gave as they needed it.

Q. 22. Substantial amounts? A. Sometimes. Well, I can't tell.

how much it amounted to, but we used to give as they needed things.

Q. 23. You gave them things as they needed them? A. Yes.

Q. 24. Was the mode of life you were living prior to Mr. Field's death comfortable and satisfactory to you, Mrs. Field?
A. Very comfortable.

Q. 25. Mr. Field, from time to time gave you money or securities? A. Yes.

Q. 26. These securities, Mrs. Field, General Motors, 27, United Fruit Company, American Telephone—how many shares of that did you have before his death? A. Sixty.

Q. 27. And 176 shares of Kennedy Company? A. That is right.

Q. 28. Were these stocks he had given you? A. Some of it, I bought myself.

Q. 29. And you had bank accounts at that time? A. Yes.

Q. 30. And you were called to the sale of—and do you recall, the sale of the Kennedy stock, and placing the proceeds in the Merchants Bank, which Mr. Waite testified to? A. Yes.

Q. 31. Since Mr. Field's death, where have you lived? A. For the first year at the Hawthorne and Vendome, and my country place and—

Q. 32. The Hawthorne and Vendome are first class residential hotels? A. It was called so, and I like it.

Q. 33. It passed for that? A. Yes.

Q. 34. You moved from one to the other? A. Yes.

Q. 35. At my request, Mrs. Field, have you given some thought to estimating how much your ordinary living expenditures have been annually since Mr. Field's death? A. Well, just my personal expenses, between six and seven thousand—about six thousand—over that, probably.

Q. 36. Over six thousand? A. Yes.

Q. 37. You don't keep a book of expenses? A. Mr. Waite has all of it.

Q. 38. You have some notes on the subject, and you have con-

sidered that in preparing yourself to answer this question? *A.* Yes.

Q. 39. Now, when you say six or seven thousand dollars a year, as ordinary living expenses, you don't include taxes that you paid or any non-recurring expenses? *A.* No, large amounts like traveling, for instance, trips, some special account—

Q. 40. Or gifts to people? *A.* Gifts and automobiles, and things like that.

Q. 41. But you did mean to include your ordinary costs in living? *A.* Yes.

Q. 42. Will you consider now some note of some of the expenditures you have made since Mr. Field's death of this exceptional character, that wouldn't be included in the six thousand dollars a year? *A.* Well, there would be two automobiles, one a Ford. It is something like 855, and the second one was a LaSalle, which was \$1435, I think, and then—

Q. 43. Any coats? *A.* Yes, the one I have on.

Q. 44. What did that cost? *A.* This one I think was \$2250. I think that was the cost of it. And Robert, I paid his expenses, were about \$1500.

Q. 45. Robert is who? *A.* Robert isn't my adopted child but Mr. Field's adopted boy.

Q. 46. Now, how about Deborah L. Russell? *A.* She had trouble last year. Her husband died from an unknown disease, and I gave her seven hundred to pay a hospital bill.

Q. 47. And her children, she has a boy and girl? *A.* One son. I have helped put through medical school in New York.

Q. 48. What has that cost you? *A.* About \$1500, I think.

Q. 49. He is now an interne? *A.* Just made an interne at Bellevue.

Q. 50. And as to the girls, Mrs. Field. *A.* The girls, I give them their extra clothing that they can't quite afford to have. I gave Deborah a fur coat this winter, and Elizabeth's little girl, I kept in good clothing, and the other little girl. They have two children.

Q. 51. Have you been able to do whatever you wanted to do for your relatives within the amounts you have spent? A. Yes, I have. Mr. Field's brother, I have helped a little bit.

Q. 52. Now, on particular travel trips. Have you taken any trips for your enjoyment? A. I went to Nassau and Bermuda.

Q. 53. What did those trips cost? A. About eight hundred apiece, I think.

Q. 54. Have you any unusual medical expenses, Mrs. Field? A. Yes, I had about five hundred, I think, dental bills in four years, an infection, and then I had pneumonia, and I was also at the Phillips House of the Massachusetts General Hospital of Boston.

Q. 55. And these expenditures are in addition to the six thousand living expenses you testified to? A. Yes.

Q. 56. When Mr. Field made the will in evidence, which is dated December, 1935, did you also make a will? A. At the same time.

Q. 57. Did you have any talk with Mr. Field on the subject of the disposition of your respective properties? A. Well, yes, over my house in Buckland chiefly.

Q. 58. Did he say anything about his intention with regard to charitable gifts? A. Yes, he always contended that his money was first made—that was his start with Mr. Kennedy. Mr. Kennedy and Mr. Field in Beverly—that was the first store they opened after Hyde Park, that was where they obtained their start, and Mr. Field always claimed that part of his money came from the public there and should go back to the public as much as possible. Also Dr. Johnson, who has built up that hospital was our family doctor, so that was why he wanted eventually all the money would go to this, and also he has four cases of cancer in his family, and also my sister died of cancer, and that is the reason everything goes to those hospitals.

Q. 59. Did you make your will at the same time, leaving your estate to charity? A. Mine goes to charity also.

Q. 60. You also made a subsequent will which goes in trust to

these children, but subsequent to that, all goes to charity? A. All goes to charity.

Q. 61. Do you know whether or not you have been able to live and make all your expenditures well within the income which has been available to you? A. Yes.

Q. 62. Have you any idea how much you have been able to accumulate? A. Aside from what I spent?

Q. 63. Yes. A. Yes, I think about \$44,000.

Q. 64. In savings bank accounts? A. Sixteen, I think, in bank accounts, and then I already had, I think something like—well, in all, I think it amounted to \$44,000. And then my checking accounts, two checking accounts.

Q. 65. Your checking account at the Merchants, have you any idea how much that has increased? A. \$23,000, a little over. Greenfield Trust, I think, \$5,000.

Q. 66. Have you ever asked Mr. Waite for any of the principal of your husband's estate? A. No, I have not.

Q. 67. Or asked anybody else for it? A. No.

Q. 68. Is it your present intention to ask for any money from that estate? A. No.

Mr. Thayer. I think that is all.

* * * * *

CAPITAL

73 Pet's Ex. 2. Admitted in Evidence 2/26/41
 MAY L. FIELD AND ESTATE AND TRUST OF RO M. FIELD

MAY 3, 1936 - DECEMBER 31, 1940

Exhibit 2

	1936 MAY 3	1937 JANUARY 1	1938 JANUARY 1	1939 JANUARY 1	1940 JANUARY 1	1940 DECEMBER 31
Agency Account (a)			18 962.35	18 949.08	18 961.34	18 910.95
Personal Holdings:						
100 Shs. General Motors Corp. Common @ 6 1/8 (b)	6 150.00	6 150.00	6 150.00	6 150.00	6 150.00	6 150.00
27 Shs. United Fruit Co. Capital @ 70 1/4	1 890.00	1 890.00	1 890.00	1 890.00	1 890.00	1 890.00
410 Shs. American Telephone & Telegraph Co. Capital @ 150 5/8 (d)	61 756.25	61 756.25	61 756.25	61 756.25	61 756.25	61 756.25
178 Shs. Kennedy Co. Prd. @ 90 (d)	16 080.00	16 080.00				
Savings Bank Deposits (e)	18 608.35	18 575.11	22 423.69	29 088.83	33 306.85	34 443.22
Checking Accounts:						
Merchants National Bank of Boston (f)	2 492.19	5 480.99	7 938.80	18 196.37	21 061.96	23 252.64
Franklin County Trust Co. of Greenfield Mass. (g)			1 270.30	1 785.30	1 717.31	4 976.11
TOTAL PERSONAL ASSETS	<u>106 926.79</u>	<u>109 872.35</u>	<u>120 391.39</u>	<u>137 755.83</u>	<u>144 843.71</u>	<u>151 379.17</u>
Estate Account (h)	879 764.79	878 730.45	111 755.27	99 313.23	99 313.23	95 589.19
Trust Account (i)	2222	2222	252 222.55	222 222.50	222 222.50	270 457.14
TOTAL FIDUCIARY CAPITAL	<u>879 764.79</u>	<u>878 730.45</u>	<u>371 754.82</u>	<u>348 151.73</u>	<u>368 643.93</u>	<u>366 046.33</u>
TOTAL	<u>386 681.58</u>	<u>388 602.80</u>	<u>492 146.21</u>	<u>505 907.56</u>	<u>513 487.64</u>	<u>517 425.50</u>

- Footnotes (a) Source, Capital Account of Merchants National Bank of Boston as Agent at book value
 (b) Valuation of similar securities owned by decedent as returned by the taxpayer for Estate tax purposes as of May 3, 1936 and not disputed by the Commissioner of Internal Revenue
 (c) Source, The Commercial & Financial Chronicle, Vol. 142, Part 2, for May 2, 1936 and May 4, 1936
 (d) Valuation of similar securities owned by decedent as of May 3, 1936 as determined by the Commissioner of Internal Revenue for purposes of estate tax and not disputed by the taxpayer (350 shares of the American Telephone & Telegraph stock were jointly held by Mr. and Mrs. Field)
 (b), (c), (d) On February 24, 1941, these securities closed as follows: General Motors @ 42 7/8, United Fruit @ 65, American Tel. & Tel. @ 160 3/4 (Mrs. Field sold her Kennedy stock on February 20, 1937)
 (e) Source, savings bank books, confirmed by letters from the respective banks
 (f) Source, records of The Merchants National Bank of Boston (This account was started by a deposit of \$2,492.19 on June 3, 1936)
 (g) Source, letter from Franklin County Trust Co., Greenfield, Mass.
 (h) Source, Capital Account of The Merchants National Bank of Boston as Executor at book value
 (i) Source, Capital Account of The Merchants National Bank of Boston as Trustee at book value

EXPENDITURES OF MAY L. FIELD MAY 3, 1936 TO DECEMBER 31, 1940

	1936	1937	1938	1939	1940
Merchants National Bank					
Opening Checking Account Balance	2 492.19	5 480.99	7 938.80	18 196.37	21 061.96
(a) Deposits	4 842.79	37 086.02	28 042.87	18 822.52	20 838.79
Franklin County Trust Co.					
Opening Checking Account Balance			1 270.30	1 785.30	1 717.31
TOTAL	7 334.98	42 567.01	37 251.97	38 804.19	43 618.06
Closing Franklin Checking Account Balance		1 270.30	1 785.30	1,717.31	4 976.11
Closing Merchants Checking Account Balance	5 480.99	7 938.80	18 196.37	21 061.96	23 252.64
Deposits in Savings Banks	None	4 000.00	6 214.39	4 000.00	2 000.00
Paid to Merchants National Bank Agency Account		19 000.00			
TOTAL	5 480.99	32 209.10	26 196.06	26 779.27	30 228.75
(b) DIFFERENCE	1 853.99	10 357.91	11 055.91	12 024.92	13 389.31

FOOTNOTES (a) All the income Mrs. Field receives is paid into her checking account with The Merchants National Bank. She draws on this account to maintain her balance with The Franklin County Trust Co., but no deposits are made in The Franklin account except by check on The Merchants National.

(b) Total expenditures (maximum) \$48,684.04

PETITIONER'S EXHIBIT 4.

Be It Remembered that I, Ozro M. Field, of Beverly in the County of Essex and Commonwealth of Massachusetts, being of sound and disposing mind and memory, but realizing the uncertainty of this life, do make, publish and declare this my last Will and Testament, hereby revoking any and all Wills by me at any time heretofore made.

First. I direct my Executor hereinafter named to pay, as soon as may be after my death, all of my just debts, funeral expenses and charges of administration.

Second. I give and bequeath to my wife, May L. Field, if she shall be living at the time of my decease, all of my household furniture and furnishings, books, pictures, silverware, china, rugs, household supplies and other articles of household use, jewelry, clothing and wearing apparel, and automobiles and their appurtenances, garage equipment and supplies, owned by me at the time of my decease.

Third. If my said wife, May L. Field, shall be living at the time of my decease, then and in that case I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts, In Trust, Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarterly, annually, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars (\$100,000) and hold the same In Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:—one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts, during the term of his natural life; and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconess Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and

Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me; I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

Fourth. If my said wife, May L. Field, shall predecease me, then and in that case I give and bequeath to said The Merchants National Bank of Boston the sum of One Hundred Thousand Dollars (\$100,000), In Trust, Nevertheless, for the following uses and purposes, to-wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarterly, annually, or oftener in the discretion of my said Trustee, as follows:—one-quarter to my said adopted daughter, Deborah Jensen, during the term of her natural life; one-quarter to my said adopted daughter, Elizabeth Harnden, during the term of her natural life; one-quarter to my said adopted son, Robert M. Field, during the term of his natural life; and one-quarter to said Dora L. Russell, during the term of her natural life. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the

last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

Fifth. All of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, where-soever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, my said wife, May L. Field, predeceasing me, I give, devise and bequeath in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital.

Sixth. If payments of income or principal under any trust in this Will created are to be made to a person, who, in the opinion of my Trustee, is not competent or able to handle funds properly and carefully, then my Trustee may, in its discretion, make such payments in whole or in part for one or more of the following purposes:—

- (a) Direct to said beneficiary;
- (b) To the natural or legal guardian or conservator of such person;
- (c) Expend the same for the said beneficiary's comfort, support, education and/or happiness.

Seventh. My Trustee shall have full power and authority to manage, control, invest and reinvest any and all of the property and estate of every kind and nature in this Will devised and bequeathed to it as Trustee, and I hereby authorize and empower my said Trustee to sell at any time the whole or any part of any of the trust property held by it under this Will as it in its judgment and discretion shall deem for the best interests of the trust estate,

with full power and authority to execute, acknowledge and deliver such deeds and instruments as may be necessary to pass title thereto, and no purchaser shall be required to see to the application of the purchase money.

Eighth. I hereby authorize and empower my said Trustee to hold or retain in the trust fund or funds any securities or other property belonging to me at the time of my decease as it in its judgment and discretion shall deem proper. It may also participate in any reorganization, merger or consolidation of any corporation whose stock, bonds or other evidences of indebtedness constitute a part of the trust estate.

Ninth. In addition to and not in limitation of all common law and statutory powers my said Trustee, or its successor or successors in trust, in relation to the trust funds shall have power to pledge, mortgage, to lease with or without option to purchase, to sell in whole or in part, at public or private sale without approval of any court, to exchange property for other property, to retain securities or properties received from the Executor, although of a kind or in an amount which would ordinarily be considered as not suitable for a trust investment, and to keep any or all securities or other properties in its own name without disclosing its trust capacity, or in the name of some other person with a Power of Attorney for their transfer attached; it may decide whether accretions to the trust property shall be treated as principal or income and whether expenses shall be charged to principal or income; to decide whether or not to make deductions for depreciation, obsolescence, amortization or waste and to compromise any doubtful claim, to make payments of principal or income to minors as though they were of full age, to expend for the comfort, education and happiness of minor beneficiaries the income due them or to pay the same to their natural or legal guardians. All such decisions made by my Trustee in good faith shall be conclusive upon all parties interested.

Tenth. Whenever it becomes necessary to divide the trust estate

for the purpose of distribution or otherwise, my Trustee may make division without formal appraisals or sales.

Eleventh. The income or principal of the trust funds shall not be assignable and cannot be anticipated or alienated in any manner by the beneficiaries, and is not to be subject to claims of creditors of any beneficiary nor subject to bankruptcy proceedings or any process of law.

Twelfth. My Said Trustee shall only be liable for its own wilful misconduct of gross negligence.

Thirteenth. I direct that all inheritance, legacy or succession taxes upon any of the foregoing bequests or devises in this Will shall be paid by my Executor as a part of the expenses of administering my estate.

Fourteenth. If any legatee or beneficiary under this Will shall contest the validity of this Will, I direct that any bequest or devise to or for the benefit of such legatee or beneficiary so contesting shall not take effect and that no property, real or personal, shall pass to such contesting legatee or beneficiary under this Will.

Fifteenth. Any bequest made under this Will cannot be anticipated or alienated in any manner by any legatee and is not to be subject to any claims of creditors of any legatee nor subject to bankruptcy proceedings or any process of law.

Sixteenth. I hereby nominate and appoint said The Merchants National Bank of Boston Executor of this my last Will and Testament, and I request and direct that it be exempt from giving any surety or sureties upon its official bond either as Executor or as Trustee under this Will.

Seventeenth. I hereby authorize and empower my said Executor to sell and dispose of any property, real or personal, left by me at the time of my decease, and to convey the same by such instruments as may be necessary to transfer title thereto, and no purchaser shall be required to see to the application of the purchase money.

In Witness Whereof I hereunto set my hand and seal and publish and declare this to be my last Will and Testament in the

presence of three witnesses whose names are hereunto subscribed this ninth day of December in the year of our Lord one thousand nine hundred and thirty-five.

OZRO M. FIELD [SEAL]

Signed, sealed, published and declared as and for his last Will and Testament by the said Ozro M. Field in the presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Rutherford E. Smith

Frederick C. Allen

Grace M. Littlewood

Will proved June 2, 1936.

ESSEX, SS. PROBATE OFFICE.

June 8, 1936.

A true copy of record.

[SEAL] Attest: NATHAN A. FOWLER, *Asst. Register*.

Docket No: 105004. Docket No. 105005.

[Titles omitted.]

DESIGNATION FOR RECORD ON REVIEW.

[Filed May 21, 1942.]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, copies duly certified as correct of the following documents and records in the above-entitled causes in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board in each cause.
2. Pleadings before the Board:
 - (a) Petition in each cause, including annexed copy of deficiency letter.
 - (b) Answer in each cause.

Record on Petition for Review.

3. Findings of fact and opinion, and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Testimony of witnesses Albert H. Waite and Mary [sic] A. Field, lines 21 to 24, inclusive, page 9, pages 10 to 25, inclusive, and lines 1 to 15, inclusive, page 26 of the official report of proceedings before the board, together with Exhibits 1 to 4, inclusive, but excluding Exhibits 5 to 10, inclusive.
6. Statement of points filed by petitioner on review.
7. This designation for record on review.

J. P. WENCHEL, w,

Chief Counsel, Bureau of Internal Revenue.

Copy of this designation for record on review was mailed to Edward C. Thayer, Esq., 53 State Street, Boston, Massachusetts, attorney for respondent on review, this date, May 20, 1942.

RALPH F. STAUBLY,

Special Attorney, Bureau of Internal Revenue.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

DESIGNATION OF ADDITIONAL PORTIONS OF THE
RECORD TO BE CONTAINED IN THE PRINTED
RECORD ON REVIEW.

[Filed May 29, 1942.]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit copies duly certified as correct of the following documents and records in the above-entitled causes in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit heretofore filed by the Commissioner of Internal Revenue in addi-

Certificate.

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tion to the documents and records called for by the petitioner on review in his designation heretofore filed with the Board:

1. The reporter's transcript of the evidence and proceedings at the trial before Mr. Murdock on February 26, 1941, *i.e.*, in addition to the portions thereof designated by the Commissioner, the following additional pages: pages 1-9 [typewritten], inclusive, and pages 26-28 [typewritten], inclusive.

2. The following specified exhibits, *viz.*: Petitioner's Exhibits 5-10, inclusive.

3. This designation.

EDWARD C. THAYER,

Attorney for the Petitioners.

I hereby certify that on May 28, 1942, I served the foregoing designation of additional portions of the record upon the respondent by mailing, postage prepaid, a copy thereto to J. P. Wenhel, Chief Counsel, Bureau of Internal Revenue, attorney for the petitioner on review, addressed to him at the Bureau of Internal Revenue, Washington, D. C., and at the same time and in the same manner gave notice in writing of the filing of this designation with the clerk of the United States Board of Tax Appeals at Washington, D. C.

EDWARD C. THAYER,

Attorney for the Respondents on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

CERTIFICATE.

I, B. D. Gamble; clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing [typewritten] pages, 1 to 98, inclusive [printed pages 1 to 61], inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the

praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this fifth day of June, 1942.

[SEAL]

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

ORDER OF CIRCUIT COURT OF APPEALS.

June 16, 1942.

Upon motion of petitioner for review, assented to, it is ordered that those parts of the record called for by the counter-designation be omitted from the printed record on petition for review.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

[fol. 63] On December 1, 1942, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on December 30, 1942, the following opinion of the Court was filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST
CIRCUIT, OCTOBER TERM, 1942

No. 3787

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

MERCHANTS NATIONAL BANK OF BOSTON, Executor,
Respondent

Petition for Review of Decision of the United States Board
of Tax Appeals

Before Magruder, Mahoney and Woodbury, JJ.

Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Newton K. Fox, Spec. Ass'ts to the Attorney General; J. P. Wenchel, General Counsel; Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, for Petitioner.

Edward C. Thayer, for Respondent.

OPINION OF THE COURT—December 30, 1942

MAHONEY, J.:

In this case the Board of Tax Appeals reversed the determination by the Commissioner of Internal Revenue of deficiencies of \$42,825.69 in income tax for 1937, and [fol. 64] \$26,290.93 in respondent's estate tax. The Commissioner has filed this petition for review.

The facts in this case are not in dispute and may be stated briefly as follows: Ozro M. Field, testator, died in 1936 leaving a gross estate of \$366,527.66, which included property in the amount of \$52,718.75 held jointly by him and his wife, who survived him. She was sixty-seven years of age at the date of his death. Immediately after the death of

her husband the widow owned income producing property worth about \$104,000 as well as tangible personal property and a country home in Buckland, Massachusetts. They had no children but during a previous marriage Mr. Field had adopted two girls and a boy. In 1936, the girls were married to husbands fully able to support them and the boy was nearly twenty-one years of age. Mr. and Mrs. Field made wills simultaneously leaving the residue of their estates to charity. Under the terms of the residuary trust of the decedent's will, the trustee was to pay the net income to Mrs. Field for her natural life, with the right to pay to or for her benefit "such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my wife, Mary L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." Upon her death, all of the corpus of the trust except \$100,000 was to go to the charities named in the will. The \$100,000 retained under the will was to be held in trust and the income was to be paid in equal portions to the three adopted children and a niece of Mrs. Field's for life. As each beneficiary died, his or her share of income was to be [fol. 65] paid to certain charities and upon the death of the last beneficiary the principal of this trust was to be paid over to these charities. The widow's living expenses since the death of her husband have averaged between six and seven thousand dollars a year and during this period she has been able to save excess income of about \$40,000.

In 1937 the estate realized capital gains from the sale of certain stocks held in the trust in the amount of \$100,900.31, and claimed a deduction in its income tax return on the ground that this amount had been permanently set aside for the charities named in the will. This was disallowed by the Commissioner. He also disallowed a deduction of \$128,276.94 in the estate tax return as gifts to charity on the ground that the power of the trustee to invade the corpus of the trust made it impossible to determine the amounts which the charitable legatees would receive.

We are asked to determine whether the bequests to charity are deductible from the gross estate under Section 303 (a) (3) of the Revenue Act of 1926,¹ 48 Stat. 9, 26 U. S. C. A. Int. Rev. Acts, p. 234, and whether the capital gains are deductible from the income of the estate realized in 1937, under Section 162(a) of the Revenue Act of 1936,² 49 Stat. [fol. 66] 1648, 26 U. S. C. A. Int. Rev. Acts, p. 893, as being permanently set aside for charity. We answer both of these questions in the negative and for the same reasons.

The proposition that a deduction for a charitable gift will be allowed only if the value of the charitable gift can be ascertained definitely at the date of the testator's death is not now open to dispute. *United States v. Provident Trust*

¹ "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

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(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes,

² "Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

Co., 291 U. S. 272 (1934); *Ithaca Trust Company v. United States*, 279 U. S. 151 (1929); *Humes v. United States*, 276 U. S. 487 (1928); *Helvering v. Union Trust Co.*, 125 F. (2d) 401 (C. C. A. 4th, 1942); *Gammons v. Hassett*, 121 F. (2) 229 (C. C. A. 1st, 1941). The capital gains realized from the sale of certain securities have become part of the corpus of the trust. The same considerations which determine whether the gift in remainder to charity is definite and ascertainable at the date of the death of the testator are pertinent in a determination whether the capital gains are income permanently set aside in favor of a charity. *Commissioner v. Upjohn's Estate*, 124 F. (2d) 73 (C. C. A. 6th, 1941); *Commissioner v. F. G. Bonfils Trust*, 115 F. (2d) 788 (C. C. A. 10th, 1940).

The Board of Tax Appeals stated that this is a borderline case but, nevertheless, concluded that the facts bring it within the rule laid down in the *Ithaca Trust* case. The respondent in its brief takes a similar position.

This court is committed to the view, as laid down in [fol. 67] *Gammons v. Hassett*, *supra*, that as long as the requirements of the life tenant are unmeasurable and the possibility of invasion of the corpus exists under the language of the trust instrument, then the amounts going to the charitable legatees are uncertain and unascertainable at the death of the testator and cannot be deducted from the gross estate. The decision in the instant case depends upon the proper interpretation of the language used in the testamentary trust, that is, whether or not there is present a possibility of invading the corpus of the trust in the sense that that phrase was used in *Gammons v. Hassett*, *supra*. The intention of the testator is to be found in the four corners of the will. His language is to be literally interpreted unless there is some ambiguity as to its meaning. Here the testator clearly stated that he sought to provide for the comfort, support, maintenance and/or happiness of his wife. It is, of course, true that it is difficult to define precisely what happiness means, but happiness is essentially a subjective matter and must be left to an honest determination of the widow. The testator used both the conjunctive and disjunctive showing clearly that he did not want the term "happiness" to be considered as a catch-all. It would be torturing the language used if we were to treat the word happiness as a mere superfluity. If the widow

should desire to provide permanently for the adopted children or for near relatives such a desire would be within the term "happiness". There is thus the clear possibility that the corpus of the trust may be invaded.

We recognize, as the respondent urges upon us, that there exist certain distinctions in the case before us and *Gammons v. Hassett*, *supra*. In that case the term "desire" was used, which may be said to be somewhat broader than the term "happiness". There, an invasion of the corpus of the trust depended completely upon the will of the widow. [fol. 68] Here, there can only be an invasion of the corpus of the trust if in the sole discretion and wisdom of the trustee an invasion of the principal is deemed necessary for the happiness of the widow. But this can mean no more than that the widow must convince the trustee that an invasion of the corpus is necessary to her happiness. The testator, out of abundant caution, in order to prevent any disagreement, admonished the trustee to exercise its discretion with liberality. Assuming then that she is able to convince the trustee that her happiness requires the expenditure of sums of money beyond the income and out of the corpus of the trust, the amount that would ultimately go to charity would be uncertain. Since this possibility exists within the language of the trust instrument, the case is closer to our decision in *Gammons v. Hassett*, *supra*, than it is to the *Ithaca Trust* case. The argument that under the facts in this case there is little likelihood that Mrs. Field will want to invade the corpus of the trust is similar to the argument advanced in *Gammons v. Hassett*, *supra*. We refused in that case to consider extrinsic evidence of a most persuasive nature. The widow was ninety-three years old, had been bedridden for years and had ample property of her own for her support. We said: "While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain." (p. 233.)

The respondent cites *First National Bank of Birmingham v. Sneed*, 24 F. (2d) 186 (C. C. A. 5th, 1928), *Hartford-Connecticut Trust Co. v. Eaton*, 36 F. (2d) 710 (C. C. A. 2nd, 1929), *Lucas v. Mercantile Trust Co.*, 43 F. (2d) 39 (C. C. A. 8th, 1930) and *Commissioner v. F. G. Bonfils Trust*, *supra*, as supporting its position. These cases are clearly dis-

tinguishable. The first three deal with support and maintenance of the widow and clearly fall within the rule laid [fol. 69] down in the *Ithaca Trust* case. The position which we take in the instant case is not at all inconsistent with those holdings. In *Commissioner v. F. G. Bonfils Trust*, *supra*, the trustees were directed to collect the income from the trust estate and out of the net income to pay in their absolute discretion for the education of two minor children up to \$10,000, and certain specified annuities. In the event that the income should prove insufficient to pay the annuities in full, the balance was to be paid out of the corpus of the trust estate. The will further directed that capital gains should be added to and retained as a part of the corpus of the trust estate and that within ten years after the death of the last survivor of the annuitants the corpus of the trust estate should be paid over to and expended by the foundation named in the will. The issue in that case was whether a deduction from the gross income of the trust might be taken pursuant to the terms of the will creating the trust as any part of gross income which pursuant to the terms of the will creating the trust is during the taxable year permanently set aside for charitable purposes. The amounts required for the education of the minor children and for the payment of the annuities were certain. The amount of the income that the corpus of the trust would yield was certain with the language of the *Ithaca Trust* case. It is, of course, true that as a result of changed conditions the amount of income that might result from the corpus of the trust might be diminished but this same argument was presented to the court in the *Ithaca Trust* case and was rejected as not being one of those uncertainties "appreciably greater than the general uncertainty that attends human affairs". Thus the amounts that would have to be paid out of income were measurable and it was reasonably ascertainable that the income from the corpus of the trust was more than sufficient to pay the annuitants.

In the *Ithaca Trust* case the court took the view that on [fol. 70] the basis of the past history of the widow the sums necessary for her comfort and support were ascertainable at the time of the death of the testator. As the court said (p. 154): "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money." In the case before

us we cannot say with any degree of certainty on the basis of the record what sums will be required for the happiness of the widow. Since we cannot measure the amounts which the widow may require and since there remains the possibility that the corpus of the trust may be invaded, we are constrained to conclude that the amounts which will ultimately go to charity are uncertain and cannot be deducted from the gross estate. What we have said is equally applicable to respondent's contention that the capital gains were permanently set aside for charitable purposes.

The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with this opinion.

On the same date, to wit, December 30, 1942, the following Final Decree was entered:

FINAL DECREE—December 30, 1942

This cause came on to be heard December 1, 1942, upon the record on petition for review of the United States Board of Tax Appeals and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 30, 1942, here ordered, adjudged and decreed as follows: The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

(S.) Arthur L. Charron, Clerk. (Seal.)

[fol. 71] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

Thereafter, to wit, on January 15, 1943, mandate issued, which was recalled and stayed by Order of Court of February 10, 1943.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7076)